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IMPACT OF THE ETHICS IN GOVERNMENT ACT

REPORT

BY THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., May 4, 1979.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: The attached report by the Subcommittee on Oversight and Investigations focuses on the impact of the "revolving door" provisions of the Ethics in Government Act of 1978. This subcommittee concluded that the Ethics Act does not correctly balance the interest in promoting governmental integrity against the interest in ensuring an able and dedicated Federal work force, and that neither the implementing regulations nor the amending legislation being proposed for adoption adequately address or resolve the most serious underlying problems.

The report recommends that the appropriate legislative committees promptly undertake to revise 18 U.S.C. section 207 in certain specific ways. It is our belief that the report provides a comprehensive description of the problems facing the regulatory agencies subject to the Ethics Act, and constitutes a more than adequate justification for demanding that truly remedial modifications be made in the law.

Sincerely,

BOB ECKHARDT,
Chairman, Subcommittee on Oversight and Investigations.

IMPACT OF THE ETHICS IN GOVERNMENT ACT

Summary

PURPOSE

This report is based on an inquiry by the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee into the effects of Title V of the recently passed Ethics in Government Act of 1978.[1] Title V amends 18 U.S.C. section 207 in an attempt to cope more effectively with problems presented when federal employees leave government service and deal with their former agencies on behalf of private parties. This practice is frequently referred to as "the revolving door."

The Subcommittee was interested in analyzing the extent of problems related to the "revolving door" within agencies under its oversight jurisdiction and sought to gauge the likely impact of the Act on the ability of the agencies to retain valued employees and hire desirable candidates. On April 3, 1979, a hearing was conducted at which chairmen and commissioners from six regulatory agencies discussed "revolving door" issues and assessed the efficacy of Title V.[2] The Subcommittee inquiry also included both an analysis of the interim regulations that have been promulgated by the Office of Personnel Management to "particularize" the prohibitions in new section 207,[3] and a review of the legislation recently adopted by the House Judiciary Committee to amend the provisions of Title V before its July 1, 1979 effective date.

FINDINGS AND CONCLUSIONS

Title V of the Ethics in Government Act, as enacted, does not correctly balance the interest in promoting governmental integrity against the interest in ensuring an able and dedicated federal work force. In some respects the Act is too narrow, in others too broad, and in still others simply not clear. Neither the implementing regulations nor the Judiciary Committee's legislation designed to provide a "technical fix" adequately address or resolve the most serious underlying problems.

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[1] Public Law No. 95-521, 92 Stat. 1824 (Oct. 26, 1978).

[2] *Hearings on the Impact of the Ethics in Government Act before the Subcom. on Oversight and Investigations of the House Interstate and Foreign Commerce Comm.*, 96th Cong., 1st Sess. (Abridged) (1979) [reprinted as Appendix E to this Report and hereinafter cited as *Hearings*]. The six agencies represented were the Consumer Product Safety Commission (CPSC), Federal Energy Regulatory Commission (FERC), Federal Trade Commission (FTC), Food and Drug Administration (FDA), Interstate Commerce Commission (ICC), and Securities and Exchange Commission (SEC). Comments for the record were received from the Federal Communications Commission (FCC) and the Environmental Protection Agency (EPA) and appear as Appendices F1 and F2 respectively.

[3] 44 Fed. Reg. 19974 *et seq.* (Apr. 3, 1979) [hereinafter cited as Interim Regs.]. Title IV of the Ethics Act establishes an Office of Government Ethics, which is empowered to develop, and recommend that the Office of Personnel Management promulgate, regulations relating to ethics and conflicts of interest.

RECOMMENDATIONS

Given the impending July 1st effective date,[4] the wisest course of action available at this time is for the appropriate legislative committee to revise section 207 correctly and with dispatch. Specifically—

(1) Subsection (b)(ii), which imposes a two-year ban on former high level employees aiding and assisting in the representation of a party before an agency on certain matters, should be made inapplicable to matters in which former employees merely had official responsibility;

(2) The subsection (b)(ii) ban on "aiding and assisting" should be made permanent with respect to matters in which former employees were personally and substantially involved;

(3) Subsections (a) and (b) should both be made applicable to rulemaking proceedings;

[Subsection (a) imposes a lifetime ban on representation of another party on a matter in which the person was personally and substantially involved as a federal employee.

[Basically, subsection (b) imposes two-year bans on the representation of a party or the assisting in such representation on matters that were pending under a person's official responsibility or in which he was personally and substantially involved. (See page 3 for a further description.)].

(4) Subsection (c), the one-year ban on any contacts with an agency by former high level and designated employees, should be widened to cover indirect communications, but should apply automatically only to Executive Schedule employees; and

(5) Imprecise statutory provisions should be revised to permit the drafting of sensible regulations that conform with the statutory language.

Introduction

EXPLANATION OF LEGISLATIVE PROVISIONS

The Ethics in Government Act, signed into law on October 26, 1978, was enacted by Congress to "preserve and promote the integrity of public officials and institutions." [5a] The statute imposes certain financial reporting and disclosure requirements on the personnel of the legislative, executive, and judicial branches; establishes an Office of Government Ethics and an Office of Senate Legal Counsel; provides a mechanism for the appointment of a special prosecutor; and, most importantly for the purposes of this report, amends 18 U.S.C. section 207, a criminal provision designed to disqualify former officers and employees from participating in matters relating to their previous official activities and responsibilities.

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[4] A six-month extension and a "technical fix" were proposed by Representative Danielson along with Representatives Rodino and Moorhead on March 13, 1979. See H.R. 2843 in Appendix D.

[5a] Ethics in Government Act of 1978 (as corrected by Senate Concurrent Resolution 112), S. Doc. No. 127, 95th Cong., 2d Sess. 1 (1978) [hereinafter cited as *Conference Report*].

Prior to the changes made by the 1978 legislation, section 207 prohibited an ex-employee (1) from acting as agent or attorney for another person in connection with certain matters in which the employee had participated personally and substantially; and (2) for one year after employment ceased, from appearing personally before any court or agency as an agent or attorney for another person in connection with certain matters which had been under the employee's official responsibility during his final year in office. Former section 207 (the full text of which appears as appendix A to this report) also imposed certain restrictions on the partners of executive branch employees, and those provisions were essentially unchanged by the Ethics in Government Act.

Title V of the Ethics Act (a copy of which appears as Appendix B) imposes a more elaborate system of restrictions on former employees. New section 207(a) will prohibit any former employee, in connection with certain matters in which the employee had participated personally and substantially, (1) from acting as an agent or attorney for, or otherwise representing, another person in any formal or informal appearance before his former agency, or (2) from making oral or written communications on behalf of another person to his former agency with the intent to influence it.

New section 207(b)(i) will, for two years after employment ceases, bar any former employee from undertaking the same acts prohibited in subsection (a), but in connection with certain matters that were merely pending under the employee's official responsibility at any time during his final year in office.

New section 207(b)(ii) will, for two years after employment ceases, prevent any high-ranking employee designated in new subsection 207(d) from aiding, advising, or assisting in representing another person involved in any formal or informal appearance before the employee's former agency. The prohibition applies to certain kinds of matters in which the former employee had participated personally and substantially, or which were pending under the employee's official responsibility at any time during his final year in office.

Finally, new section 207(c) will, for one year after employment ceases, prohibit any employee designated in subsection (d) from (1) acting as agent or attorney, or otherwise representing, any person (including himself) in any formal or informal appearance before his former agency, or (2) making oral or written communications on behalf of anyone to his former agency with the intent to influence it, in connection with any matter pending before the agency or in which the agency has a direct or substantial interest. A chart summarizing the various prohibitions in sections 207 (a), (b), and (c) appears as Figure 1 below:

RESTRICTIONS IMPOSED BY 18 U.S.C. § 207 AS AMENDED BY THE ETHICS IN GOVERNMENT ACT

			ACTIVITY COVERED BY BAN	
		EMPLOYEES COVERED BY BAN	REPRESENTS IN ANY APPEARANCE OR MAKES ORAL OR WRITTEN COMMUNICATIONS	AIDS, ADVISES, OR ASSISTS IN REPRESENTING CONCERNING ANY APPEARANCE
PROCEEDINGS COVERED BY BAN	particular matters involving a specific party or parties in which employee participated personally and substantially	§d employees	banned forever (§a)	banned for 2 years (§b(ii))
		other employees	banned forever (§a)	permitted
	particular matters involving a specific party or parties which were pending under employee's official responsibility	§d employees	banned for 2 years (§b(i))	banned for 2 years (§b(ii))
		other employees	banned for 2 years (§b(i))	permitted
	any proceeding pending before agency or in which agency has a direct and substantial interest	§d employees	banned for 1 year (§c)	permitted
		other employees	permitted	permitted

FIGURE 1

The prohibitions of new section 207 do not prevent a former employee from giving testimony under oath or, in certain situations, from supplying scientific or technical information.[5b] Further, the subsection (c) one-year flat ban on appearances or communications by former high ranking employees is made inapplicable to matters of a personal and individual nature (such as the former employee's own tax returns) and to certain communications based on the former employee's own special knowledge in a particular area.[5c]

Former employees who violate the law may be fined up to $10,000 and imprisoned for two years, or both.[5d] Further, the head of the agency in which the former employee served may prohibit the violator from appearing before or communicating with the agency concerning pending matters of business for up to five years.[5e]

COMPLAINTS REGARDING THE LEGISLATION

In late 1978 and 1979, shortly after passage of the Act, complaints began to percolate up from the executive branch and the independent regulatory agencies. Claims were made that valued employees were seeking to leave government prior to the July 1st effective date and that other persons whom the agencies wished to hire were rejecting job offers on the grounds that the Act would effectively lock them into government forever.

This report discusses the problems that have arisen under Title V and reviews the adequacy of the solutions that have been attempted or suggested.

[5b] 18 U.S.C. §§ 207(h) & (f).
[5c] 18 U.S.C. § 207(i).
[5d] 18 U.S.C. § 207(e).
[5e] 18 U.S.C. § 207(j).

Discussion

THE ACT: ITS PURPOSES AND IMPACT

The thrust of new section 207 and its implementing regulations is to protect the honesty and impartiality of government by preventing former employees from making, or appearing to make, unfair use of prior public service for private gain or personal aggrandizement.[6] More specifically, sections 207(a) and (b) are designed to prevent any former employee from "switching sides" and representing a private client in the same matter for which he had previously represented the government. Obviously, it is undesirable to permit an employee who has inside knowledge of the government's case or mechanisms to use those confidences against his former employer.[7]

Section 207(c), since it is not limited to matters in which the employee was involved, rests on a different theory. It interdicts attempts by former high-ranking employees to exercise influence over their former colleagues and subordinates. A public policy-maker who leaves office should not be permitted to benefit from his government experience by exploiting the actuality or appearance of "clout" with his former agency.[8]

However, post employment restraints should accomodate the need to attract and retain a qualified and experienced work force and should recognize that there are advantages associated with the movement of employees back and forth between government and the private sector.[9] People with specialized knowledge of an industry may be able to do a better job of regulating, freedom of movement assures that the government has a greater pool of potential employees, and an employee may be more willing to disagree with a superior on matters of import to the public if he is confident he can get a job elsewhere.

The problems that have arisen with respect to the new Act spring from the belief that the balance between maintaining integrity and ensuring an able work force has not been properly struck. The Subcommittee's hearings reflected the grave concern of agency heads on this point,[10] and there is abundant additional evidence in other sources.[11] The Secretary of Health, Education, and Welfare, for example, has said that Title V could cause "the greatest brain drain of talent in the history of Federal service." [12]

THE PROBLEMS

The provisions of new section 207 that have generated the most concern are subsections (b)(ii) and (c). The prohibitions in subsections (a) and (b)(i) are not controversial because, in large part, they simply reiterate restrictions already in force under former section 207.

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[6] S. Rep. No. 170, 95th Cong., 1st Sess. 31-32 (1977) [hereinafter cited as *Senate Report*]; *Interim Regs supra* note 3, at 19977 (§ 737.1(c)).

[7] *Senate Report, supra* note 6, at 31: *Interim Regs., supra* note 3, at 19977 (§ 737.1(c)(1) and (2)).

[8] *Senate Report, supra* note 6, at 31: *Interim Regs., supra* note 3, at 19977 (737.1(c)(3)) and 19983 (737.11(b))

[9] "Such a flow of skills can promote efficiency and communication between the Government and private activities, and it is essential to the success of many Government programs." *Interim Regs., supra* note 3, at 19977 (§ 737.1(c)(5)). *See also Senate Report, supra* note 6, at 32; *Hearings, supra* note 2, at 3 and 10.

[10] *See., e.g., Hearings, supra* note 2, at 23 (FDA).

[11] In early March, 1979, the New York Times reported that officials at the Departments of Health, Education, and Welfare; Defense; Energy; Transportation; and Commerce; and at the Federal Communications Commission and the Securities and Exchange Commission had all termed the problems posed by Title V as "serious." Scores May Quit High U.S. Posts over Ethics Law, N.Y. Times, Mar. 8, 1979, at 1, col. 5.

[12] *Id.* The Secretary of Health, Education, and Welfare also stated that "the problem is so serious that it has come up at the last two Cabinet meetings." *Id.* at 16, col. 1.

1. Subsection (b)(ii)

The disturbing feature of (b)(ii) is that its literal language makes the "aiding and assisting" ban applicable not only to matters in which high-ranking employees had been personally involved, but also to matters for which employees merely had "official responsibility." [13] Doctors and scientists have observed that an employee with jurisdiction over an executive department or division that awarded research grants would subsequently be prohibited from counseling other persons about any "appearance" relating to disputes over administration of those grants. This would inhibit a government employee who wished to accept a post as head of a medical school or university department, since he would not be able to talk to his own faculty members about some aspects of their government-funded research activities.[14]

This restriction is of concern principally to agencies, such as the Food and Drug Administration (FDA) and the Federal Energy Regulatory Commission (FERC), whose staffs have a significant component of professionals specializing in scientific or technical fields.[15] Agencies with staffs consisting largely of attorneys, such as the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC), are less affected because post-employment involvement by former government lawyers in matters for which they had responsibility is already barred under the Code of Professional Responsibility.[16]

The first formal response to the problems raised by (b)(ii) came from Congress. On February 16, 1979, the chairmen and ranking members of the House-Senate Conference on the Act transmitted a letter and memorandum to the Director of the Office of Government Ethics (OGE).[17] The memorandum asserted that:

> Both the policy and legislative history of the provision demonstrate that "aiding and assisting in representing" is restricted only to matters in which the former high-ranking official was "personally and substantially involved" while in office.[18]

The memorandum supported this argument by citing (1) language in the conference report, (2) discussions in the conference, and (3) "policy grounds." The language from the conference report relied upon was as follows:

> It is the intention of the conference that this provision (§ 207(b)(ii)) will prohibit a former officer or employee from subsequent consultation on a matter, in which he was personally and substantially involved while in office, even though he is not representing a party in that matter.[19]

With respect to the conference discussion, the memo stated:

> During the conference, the "aiding and assisting in representing" provision was repeatedly linked to "personal and substantial matters." [20]

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[13] "Official responsibility" is defined in 18 U.S.C. § 202 as: "the direct administrative or operating authority whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."

[14] *See Interim Regs., supra* note 3, at 19982–83 (§ 737.9(h) Ex. 7).

[15] *See Hearings, supra* note 2, at 6 (FERC) and 22 (FDA).

[16] *See id.*, at 29. Canon 9 of the American Bar Association's Code of Professional Responsibility (1969) provides that "a lawyer should avoid even the appearance of professional impropriety," and elaborates in Ethics Consideration 9-3 as follows:

"After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

[17] The documents are reprinted at 125 Cong. Rec. S 1613 (daily ed. Feb. 21, 1979).

[18] *Id.* at S. 1614.

[19] *Id.*, citing *Conference Report, supra* note 5a, at 74.

[20] *Id.*, citing Stenographic Transcript, House-Senate Conference on S. 555, at 133–134 (Oct. 5, 1978).

And finally, as to policy, the memo argued that:

> Matters more remotely under "official responsibility" would not involve such specialized knowledge and thus would not justify this type of restriction.[21]

The OGE, however, was not persuaded that these arguments allowed alteration of the plain words in Title V.[22] That decision was correct, given the standard rule of statutory construction that legislative history will not be consulted by the courts unless the language of the law is unclear.[23] Both the OGE and the Attorney General responded to the arguments in the conference managers' memorandum by recommending passage of a "technical amendment" to achieve the desired result.[24]

This brings us to the recent legislative activity of the House Judiciary Committee. On April 6, 1979, the Administrative Law and Governmental Relations Subcommittee reported H.R. 3325, a copy of which appears as Appendix C1. On April 24 and 25, the full Judiciary Committee considered, and adopted with one amendment not relevant here,[25] the language of S. 869. That bill, a copy of which appears in Appendix C2, had previously been passed by the Senate and is similar to H.R. 3325.[26]

The language adopted by the Judiciary Committee would make certain changes in subsection 207(b) as shown below. Language to be deleted is bracketed and language to be added is italicized.

> (b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) [concerning] *by personal presence at* any formal or informal appearance before—
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> (1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
>
> (2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
>
> (3) *as to* (*i*), which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, *as to* (*ii*), in which he participated personally and substantially as an officer or employee;

The phrases inserted in subsection (b)(3) are designed to make clear that the "aiding and assisting" prohibition in subsection (b)(ii) applies only to matters in which the former high-ranking employee

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[21] *Id.*

[22] *Interim Regs.*, *supra* note 3, at 19975.

[23] *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 449 (1936).

[24] *Interim Regs.*, *supra* note 3, at 19975.

[25] H.R. 3325 and S. 869 amended subsection 207(d) so that certain military officers would be assured of the same treatment under section 207 as civilians in comparable pay grades. See *Interim Regs.*, *supra* note 3, at 19976. That language was deleted by the House Judiciary Committee.

[26] H.R. 3325 inserted the phrase "as to (ii)" in the middle of subsection (b)(3) in an effort to make clear that the "aiding and assisting" prohibition in subsection (b)(ii) applied only to matters in which former high-ranking employees had been "personally and substantially" involved. Unfortunately, while the language did make subparagraph (b)(ii) expressly applicable to matters wherein one had been involved personally and substantially, it did *not* eliminate the applicability of subparagraph (b)(ii) to matters wherein one had exercised official responsibility. As a matter of statutory construction, the language prohibited both actual representation and "aiding and assisting" with respect to official responsibility matters, but applied *only* the "aiding and assisting" bar to personal participation matters. This was cured in S. 869 by inserting the phrase "as to (i)" immediately at the beginning of subsection (b)(3).

had been "personally and substantially" involved, and not to matters wherein the employee had merely exercised official responsibility. This change is unobjectionable.

The other change effected in subsection (b) is, however, to make the "aiding and assisting" prohibition applicable only to representational activities involving the "personal presence" of the former employee at any formal or informal appearance by the former employee's client. This clearly narrows the restriction, because present subsection (b)(ii) prohibits any aiding or assisting "concerning" a formal or informal appearance by the former employee's client, regardless of whether the former employee is physically present at the appearance or has rendered assistance previously in private.

This modification opens an extremely large loophole, especially given that subsection (b)(ii) is to be made applicable only to matters in which the former employee was personally involved. If anything, assistance by personal presence at an appearance is *less* objectionable than "back room" counsel precisely because it occurs in public. It makes no sense to prohibit former employees from "switching sides" by personally representing private clients or counseling them at hearings, but to allow confidences gleaned from government service to be disclosed as long as the communication occurs behind closed doors.[27]

It has been suggested that the effect of the "personal presence" clause is not really pernicious, because the most troublesome sort of back room consultation is the kind carried on by attorneys, and such activity with respect to personal participation matters is already barred by the Code of Professional Responsibility.[28] However, if Watergate taught us anything, it is that canons of professional ethics should not be relied upon to control the activities of attorneys involved in policy formation. In fact, cases have been brought against attorneys under former section 207. Furthermore, there are persons engaged in representational activity before federal agencies who are not attorneys at all.[29]

In sum, H.R. 3325 and S. 869 do not successfully "fix up" Title V. To the contrary, they unwisely weaken section 207, and neglect altogether certain other features of section 207 that pose a greater need for remedy than do the "problems" the bill purports to solve.

For example, if subsection (b)(ii) is to be limited to matters in which former high-ranking employees personally participated, and is designed to prevent side switching in an "aiding or assisting" context, there is no good reason to lift the ban (as subsection (b)(ii) does) once the employee has been out of office for two years. Both subsection (a) and subsection (b)(i) bar representational activity *forever* with respect to personal participation matters. The operation of such a ban, of course, becomes moot once the underlying "particular matter" in which the employee participated has been resolved, but the point is that a former employee's intimate knowledge about the government's case can be just as potent and valuable to a private client after three years as after two. Our hearings revealed general

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[27] The *Interim Regs.*, *supra* note 3, at 19976, state that both the OGE and the Attorney General support the limitation of (b)(ii) to "personal presence."

[28] *See* note 16, *supra*.

[29] ICC practitioners, for example, need not be attorneys. *Hearings*, *supra* note 2, at 34.

agreement that the subsection (b)(ii) prohibition should logically be made permanent.[30]

For the same reasons, there is no good justification for limiting (as subsection (b)(ii) does) the "aiding and assisting" ban to high-ranking subsection (d) employees. Subsections (a) and (b)(i) are both applicable to all employees, and subsection (b)(ii) should be also.

2. Subsection (c)

Turning now to subsection (c), it will be recalled that this subsection imposes a one year flat ban on representational contacts by high-ranking former employees with their agencies. The aspect of this prohibition that has proved most controversial is that it applies to any and all matters pending at the agency, regardless of whether the former employee had anything to do with them. Indeed, the ban applies even to matters that commence after the employee leaves.

Unlike subsection (b)(ii), subsection (c) is troubling to agencies staffed largely with lawyers because the Code of Professional Responsibility applicable to attorneys does not bar former employees from involvement with agency matters in which the lawyer had no previous connection.[31] It is especially painful for agencies such as the Internal Revenue Service or the SEC that operate in specialized areas where private parties primarily need representation only to deal with the regulatory agency.[32]

The section 207(c) ban applies to the employees enumerated in section 207(d), thus covering (1) all "Executive Schedule" officers, (2) persons compensated at the GS–17 level or higher who have been found by the OGE Director to have significant decision-making or supervisory responsibilities, (3) active duty military officers compensated at the O–7 level or higher,[33] and (4) such other persons as have been found by the Director of OGE to have significant decision-making or supervisory responsibilities. The interim regulations issued by OGE designate for coverage all persons in GS–17 positions or higher, but provide that agencies may apply to exempt specific positions.[34]

Section 207(d) simply sweeps too many people into the subsection (c) ban. It fails to strike the proper balance between protecting against improper influence and assuring that government can attract to its ranks the best people possible. One simple solution would be to limit mandatory subsection (c) coverage to Executive Schedule employees. If that is too narrow, then the agencies should be permitted, by rulemaking, to include such other lower ranking employees as is necessary to prevent the exercise or appearance of undue influence.[35]

From a different standpoint, subsection (c) is too narrow because it fails to bar *indirect* communications. Thus, although a former employee who is covered by the subsection cannot place a telephone call to the agency, he can get an associate to do so, and apparently can tell the associate to say that the former employee "sends his regards."

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[30] *Id.* at 11 (SEC), 29 (FERC), 30 (FTC).

[31] *See* note 16, *supra.*

[32] *Hearings, supra* note 2, at 3 (SEC). *Cf. id.*, at 7, 17. Some other agencies are less concerned about subsection (c) because they have provisions in their organic acts that impose similar restrictions. *See* 15 U.S.C. § 2053 (applicable to all CPSC employees) and 42 U.S.C. § 7215 (applicable to "supervisory employees" at the Department of Energy). *Cf. Hearings, supra* note 2 ,at 6–7 (FERC).

[33] *Cf.* note 25 *supra.*

[34] *Interim Regs., supra* note 3, at 19986 (§ 737.25(b)(1)). *See* also *id.*, at 19976.

[35] This general approach is viewed favorably by regulatory agencies. See *Hearings, supra* note 2, at 4 (SEC, FERC, FCC), 19 (ICC).

This wields the influence almost as effectively as direct communication, and should not be permitted.

Nothing in either the interim regulations or in the Judiciary Committee's legislation addresses the flaws we have identified in subsection (c).

3. Other Problems

Besides the difficulties presented under subsections (b)(ii) and (c), new section 207 has other defects. First, it appears that, unlike subsection (c), neither subsection (a) nor subsection (b) cover general rulemaking proceedings. While the exclusion seems to have been intentional, it results from the presence of a phrase referring to "particular matters involving a specific party or parties" and not from statutory language expressly excluding rulemaking.[36]

In any event, the omission of rulemaking is unwise. It permits any former government employee to represent a private party in a rulemaking proceeding even though the employee had personally worked on the same proceeding while at the agency. The outcome of many rulemaking proceedings is of tremendous significance to particluar parties in the private sector. The evil of switching sides is no less grave in a rulemaking proceeding than it is in an adjudication. It is hard to see, example, why a rotary lawn mower expert who is involved in the Consumer Product Safety Commission's work on mowers should be allowed to leave the CPSC and assist a manufacturer in a rulemaking proceeding that will set safety standards for rotary lawn mowers. The only agency matters that should be exempt from subsection (a) and (b) coverage are interpretive rules, general statements of policy, and rules of agency organization and procedure.[37]

Secondly, although section 207 is a criminal statute, it is couched in such vague language that it might not survive a constitutional attack. The Supreme Court has stated that a penal statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," adding that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[38] Yet the introduction of "technical" amendments to state the intent of the Ethics Act, and the recent debate regarding the meaning of the Act's provisions, demonstrate rather vividly that men of common intelligence must guess and do differ about its application. The federal employees who will be subject to section 207 deserve a clearer message as to what their duties are.[39]

The interim regulations promulgated by OPM[40] are touted as "solving the problems," but an examination of them raises questions about both their faithfulness to the purposes of the statute and their usefulness in clarifying what conduct is statutorily prohibited. For example, the regulations implementing the subsection (b)(ii) ban on "aiding and assisting" provide that a former employee is *not* barred from "customary managemental activity."[41] The regulations elabo-

[36] See *Senate Report*, *supra* note 6, at 151; *Interim Regs.*, *supra* note 3, at 19974–75 and 19979 (§737.5(c)).
[37] *Cf.* 5 U.S.C. §553(b)(A).
[38] *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).
[39] *Cf. Hearings.*, *supra* note 2, at 30.
[40] *See* note 3, *supra*.
[41] *Interim Regs.*, *supra* note 3, at 19982 (§737.9(c)).

rate by explaining that an employee responsible for a federal grant program may leave office and subsequently advise his private sector associates and subordinates, who deal with the same grant program, about how the physical or human resources of the private client will be used to execute any current or proposed grant. Yet the statute says nothing about exempting "managemental activity" nor does that notion appear in the legislative history.

The regulations also provide that the representational assistance barred by subsection (b)(ii) does not include advice by a former employee about how the representation in a particular appearance should be conducted, except when such advice utilizes "specific knowledge which came to [the advisor] as a government employee." [42] A footnote to this provision baldly explains that "[g]iven the literal language of the statute, the Attorney General believes it cannot be restricted to 'specific knowledge which came to him as a government employee.' But in the exercise of his prosecutorial discretion, the Attorney General will use the interpretation in this regulation." [43]

Similarly, rules applicable to the one-year no contact ban in subsection (c) have doubtful elements. The regulations permit a former Internal Revenue Service employee to prepare and mail a private client's tax return. The regulations assert that this would not constitute a prohibited act, and note that, should any controversy arise, the former employee may not represent the client but may "state how the return was prepared." [44] Yet, how can the preparer of an income tax return communicate information to the IRS regarding the manner in which he prepared the return without influencing the ultimate question of whether or not the return is proper? [45]

The subsection (c) regulations also state that an ex-employee may prepare a grant application to his former office, listing himself as principal investigator and signing an assurance that he will be responsible for the scientific direction of the project if an award is made.[46] The theory is that the former employee is not violating the law by doing this, as long as he does not actually argue for approval of the application. However, there is obviously a potential for the same influence the legislation seeks to eliminate when a former high-ranking employee can display his name on a grant application.

All in all, based on the statute, its legislative history, and the implementing regulations, there is good reason to arrive at the same conclusion reached by one witness at the hearings of the Oversight Subcommittee.

> I submit to you this activity we are all engaged in is about as good evidence as you could find that this Government has had a little difficulty figuring out what it wants to do.[47]

Our findings, conclusions, and recommendations are set forth in the "Summary" at the beginning of this report.

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[42] *Id.* (§ 737.9(d)).
[43] *Id.*
[44] *Id.* at 19983 (§ 737.11(d) Ex. 1).
[45] *Cf. Hearings, supra* note 2, at 18–19.
[46] *Interim Regs., supra* note 3, at 19984 (§ 737.11(f) Ex. 1).
[47] *Hearings, supra* note 2, at 23 (FDA).

Appendix A

[Former 18 U.S.C. § 207]

207. Disqualification of former officers and employees in matters connected with former duties or official responsibilities—Disqualification of partners.—(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

(b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested, and which was under his official responsibility as an officer or employee of the Government at any time within a period of one year prior to the termination of such responsibility—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both: Provided, That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility—

Shall be fined not more than $5,000, or imprisoned not more than one year, or both.

A partner of a present or former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia or of a present or former special Government employee shall as such be subject to the provisions of sections 203, 205, and 207 of this title only as expressly provided in subsection (c) of this section. (Oct. 23, 1962, P. L. 87-849, § 1(a), 76 Stat. 1123.)

44-844—79——3

Appendix B

Title V of the Ethics in Government Act

TITLE V—POST EMPLOYMENT CONFLICT OF INTEREST

Sec. 501. (a) Section 207 of title 18, United States Code, is amended to read as follows:

"§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

"(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

"(1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

"(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

"(3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

"(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) concerning any formal or informal appearance before—

"(1) any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

"(2) in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

"(3) which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or in which he participated personally and substantially as an officer or employee; or

"(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

"(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

"(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

"(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest—

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

"(d) Subsection (c) of this section shall apply to a person employed—

"(1) at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

"(2) in a position for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, and who has significant decision-making or supervisory responsibility, as designated by the Director of the Office of Government Ethics, in consultation with the head of the department or agency concerned;

"(3) on active duty as a commissioned officer or a uniformed service assigned to a pay grade of O–7 or above as described in section 201 of title 37, United States Code; or

"(4) in a position designated by the Director of the Office of Government Ethics. Within twelve months from the date of enactment of this subsection, the Director of the Office of Government Ethics shall designate positions which are not included under paragraph (2) of this subsection and which involve significant decision-making authority, or other duties which are substantially similar to those exercised by persons covered by paragraph (2) of this subsection. On an annual basis, the Director shall review the positions designated pursuant to this paragraph, making additions and deletions as are necessary to satisfy the purposes of subsection (c). Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in exercising his responsibilities under this paragraph.

"(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions which are distinct and separate from the remaining functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

"(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

"(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officer or employee or special Government employee participates or has participated personally and substantially as an officer or employee through

decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

"(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

"(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer or employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

"(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a). (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before, or, with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.".

(b) The item relating to section 207 in the table or sections at the beginning of chapter 11 of title 18, United States Code, is amended to read as follows:

"207. Disqualification of former officers and employees; disqualification of partners of current officers and employees.".

APPLICABILITY

SEC. 502. The amendments made by section 501 shall not apply to those individuals who left Government service prior to the effective date of such amendments or, in the case of individuals who occupied positions designated pursuant to section 207(d) of title 18, United States Code, prior to the effective date of such designation; except that any such individual who returns to Government service on or after the effective date of such amendments or designation shall be thereafter covered by such amendments or designation.

EFFECTIVE DATE

SEC. 503. The amendments made by section 501 shall become effective on July 1, 1979.

Appendix C1

[H.R. 3325, 96th Cong., 1st sess.]

A BILL To amend section 207 of title 18, United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Subsection (b) of section 207 of title 18, United States Code, as amended by the Act of October 26, 1978 (Public Law 95–521, section 501(a); 92 Stat. 1864) is amended as follows: in clause (ii), strike "concerning" and insert "by personal presence at"; and in subparagraph (3), after "responsibility, or" insert ", as to (ii),".

Subsection (d)(3) of the aforesaid section 207 is amended by striking "O–7" and inserting "O–9"; and by inserting after "or" the following:

"at a pay grade of O–7 or O–8 who has significant decisionmaking or supervisory responsibility as designated by the Director of the Office of Government Ethics in consultation with the head of the department or agency concerned; or".

Appendix C2

[S. 869, 96th Cong., 1st sess.]

A BILL To amend section 207 of title 18, United States Code

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 207 of title 18, United States Code, as amended by the Act of October 26, 1978 (Public Law 95-521, section 501(a); 92 Stat. 1864) is amended as follows: In clause (ii), strike "concerning" and insert "by personal presence at"; and in subparagraph (3), before "which was" insert ", as to (i)," and after "responsibility, or" insert ", as to (ii)".

Subsection (d)(3) of the aforesaid section 207 is amended by striking "O–7" and inserting "O–9"; and by inserting after "or" the following: "at such pay grade of O–7 or O–8 who has significant decisionmaking or supervisory responsibility as designated by the Director of the Office of Government Ethics in consultation with the head of the department or agency concerned; or".

Appendix D

[H.R. 2843, 96th Cong., 1st sess.]

A BILL To amend section 207 of title 18, United States Code, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b)(3) of section 207 of title 18, United States Code, as amended by the Act of October 26, 1978 (Public Law 95-521, section 501(a); 92 Stat. 1864) is amended as follows: After "responsibility, or" insert ", as to (ii)".

Sec. 2. Section 503 of Public Law 95-521 is amended by striking "July 1, 1979" and inserting "January 1, 1980" in lieu thereof.

APPENDIX E

Hearing on

IMPACT OF THE ETHICS IN GOVERNMENT ACT

Abridged Transcript

TUESDAY, APRIL 3, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2322, Rayburn Office Building, Hon. Bob Eckhardt (chairman of the subcommittee) presiding.

Present: Representatives Ronald Mottl and Norman Lent.

Participants: Charles Curtis, Chairman, Federal Energy Regulatory Commission; Donald Kennedy, Commissioner, Food and Drug Administration; Susan King, Chairman, Consumer Product Safety Commission; A. Daniel O'Neal, Chairman, Interstate Commerce Commission, accompanied by Commissioner Betty Jo Christian and Mark Evans, General Counsel; Robert Pitofsky, Commissioner, Federal Trade Commission; Harold M. Williams, Chairman, Securities and Exchange Commission.

Mr. ECKHARDT. The purpose of this hearing will be to provide a means of discussion in a very informal way between administration agency heads about this problem of the so-called revolving door. I have always thought that the revolving door in front of the building, as long as it is in good sight, is not nearly as dangerous as the nonrevolving back door.

It seems to me the ethics provisions really present two problems. One is the problem of changing sides. That is the situation where a person has been engaged in a particular process and goes into private practice having the advantage of having information in that particular procedure in which he had been formerly engaged on the other side.

The other question seems to me to be the question of undue influence.

I think these are somewhat different questions. I think they both ought to be explored. It would seem to me that some reconciliation between the administration's concerns about the integrity of agency process and the interest of the agencies in obtaining first class personnel ought to be found.

I know that, in my experience in employing staff, I find it extremely important to bring in people who are bright young people out of law schools, economic schools, or with other training during a period in their lives in which they are willing to devote a certain period of time to governmental service which may be valuable to them later in private practice or in other lines of work.

I feel it very important that they feel that they are not impeded in their future careers by engaging in that period of service for the committee.

I know that Mr. Williams had considerable concern about this question.

Chairman WILLIAMS. Mr. Chairman, the Commission's primary concern, as articulated yesterday is with Section 207(c), the one-year total bar. There is, as a practical matter, little likelihood of being able to practice securities law without interacting with the Commission.

The significance of that goes to the fundamental character of the agency and two things we try to do as part of our modus operandi.

One is to attract the very brightest young people we can, who ideally will aspire to attain a somewhat senior level in the agency and then be able to take their expertise out into private practice.

Secondly, in order to avoid the kind of incestuous quality which I think we all have to guard against, there is the desire to bring into the agency at senior levels people from the private practice of securities law to give us the benefit of their knowledge, understanding, and expertise and perspective as well.

We are already seeing, not only in terms of what people express as concerns, but in terms of the actual behavior, individual employees opting out before they arrive at the level covered by Section 207(c).

Additionally, the constraint of the one-year total bar is such that it becomes increasingly difficult to attract people to come to the agency from private practice.

And, finally, in some ways, I fear we impede the ability of some of our employees to leave where turnover might be beneficial.

In response to that, I proposed yesterday to the Judiciary Subcommittee that subsection (c) be amended to exclude any formal or informal appearance before, or any oral or written communication to, any independent agency of the United States, provided that such appearance or communication is made a matter of public record.

The two requisites are "independent agency" and "matter of public record."

I would assume that this would leave it to the ethics counselor to establish by rule or regulation what constitutes a matter of public record. We would be very comfortable with whatever type of stringent requirements he might impose, recognizing that, from the Commission's standpoint, anyone involved in the other end of such a communication would also have some responsibility because this is a criminal statute and there is an aiding and abetting liability.

Chairman Curtis, in his testimony, suggested that executive level or presidential appointees be excluded from that type of provision. I find that very comfortable. It would certainly not be our intent to provide that type of haven for commissioners.

I was talking to Charlie Ferris last night at the FCC. He indicated that, with the Curtis amendment, he would also be supportive.

From the standpoint of lawyers, if you juxtapose the bar's rules of conduct and our agency rules to the ethics legislation, you find that there is a compounding effect. For example, the proposed amendment to Section 207(b)(ii) which would allow aiding and assisting other than by personal presence in matters in which one participated personally and substantially while a government employee does not benefit lawyers. The bar rules themselves would prohibit that.

As far as that provision is concerned the constraints on SEC lawyers would be more stringent.

The rules of the Commission do not permit aiding and assisting with respect to matters that were within an employee's official responsibility. So, again, operationally, the SEC's restrictions would be more stringent.

When one takes those provisions and then superimposes on them a total bar as contained in subsection (c), the implications, from the Commission's standpoint, are rather serious.

To me it is not a matter of counting numbers of how many people have we lost or not lost, although I am willing to stand on that record as well. I am fundamentally concerned that the impact of these provisions will change the very dynamics, very texture, the very essence of the agency over time. That to me is far more important.

The only other comment I have is that I really do have a problem with ethics legislation being a matter of criminal statute as compared to an administrative violation. It just seems to me to be a kind of overkill. But that is beyond the pale of our discussion for today, I am sure.

Chairman CURTIS. Mr. Chairman, I think that, as I tried to indicate to the Subcommittee on the Judiciary yesterday, we have to raise the perception of both the public and the Congress as to what is at stake here. I think the public has every right to demand that they have assurances of the fair administration of law and the integrity of governmental processes. They have an equal right to demand, I think—a predominant right—to demand that government operate effectively and sensibly.

But we must ask whether we have gone so far in our attempt to deal with ethical questions as to diminish Government's ability to attract technical and managerial talent into an agency. I believe we have. There are two aspects of the Ethics in Government Act that concern me.

My primary concern is with the restrictive provisions of subsection b(ii) as it relates to the "advice and counseling in representing" clause. That, I think, is too broadly written and requires redefinition.

The administration has submitted a proposal which, I think, would effectively deal with that problem. I think time is critical that the so-called fix be made promptly.

I am also concerned with the one-year ban for the same reasons that Chairman Williams has identified. Here perhaps I can claim a little element of objectivity because the Department of Energy Organization Act, which created the Federal Energy Regulatory Commission, contains a similar, although somewhat different, statutory ban.

So, we would need both a change in our generic enabling act as well as in the ethics legislation to deal with it.

It seems to me important to keep in mind the multifaceted aspects of the Ethics in Government Act. First, it would prescribe conduct by a former government employee with respect to which that employee was personally and substantially involved. I do not think anyone has any trouble with that.

The next prescription is with respect to matters within areas of official responsibility. Here is where the advice and counseling clause really cuts in a restrictive way. To preclude for a two-year period advice and counseling, even in areas which are merely those of official responsibility, I think, is an unnecessary restriction and not important to the public's confidence in the process but very restrictive in our ability to retain talent and attract talent.

The one-year ban can have that effect, but I would guess that the one-year ban will operate differently depending upon the agency you are talking about.

As an old SEC alumnus, I think I have an appreciation for what Chairman Williams has said.

As he indicated, I would probably favor retaining the one-year ban for presidential appointees and perhaps also for executive level positions. These officials may be presumed to have sufficient stature as would suggest that perhaps advantage is inherent in any communication by former commissioners or presidential appointees with their colleagues or with persons for whom they had supervisory responsibility.

Once you get out of the area of official responsibility and get out of the area of matters with respect to which a person had substantial and personal involvement, it seems to me that the middle management people cannot be presumed to have such sway with their former coemployees that justifies a total one-year banning proscription. In any case, it can be dealt with by public disclosure.

Mr. Eckhardt. Tell me, why should we not simply limit (c) in accordance with subchapter 2, section 53 of Title 5. We are not really talking here about prior knowledge—we do not include consultation and advice in section (c). We are really concerned there, I think, with the exercise of influence which might be too weighty. Suppose we just limit it in that way. Keep (c) but limit it.

Chairman Curtis. That is certainly a very clean way of doing it.

I think that really addresses the most significant problem. But I would suggest that, if you couple that with a requirement that communications within the one-year period be made a part of the public record, we would have an oversight device to assure that communications do not involve matters within official responsibility with respect to that which a person may have had personal and substantial involvement.

I think that oversight device is important to give confidence that the lower echelon managers are in fact not communicating within areas of official responsibility or with respect to substantial and personal involvement matters.

Mr. Eckhardt. Mr. Williams does more than that though. He exempts any matter that would be made a matter of public record.

I am suggesting that we not exempt anything with respect to this top echelon. We might add the requirement that anyone below the top echelon could engage under c. But perhaps we should require

that, when they do, their contacts with the agency during that year period should be a matter of public record.

Chairman CURTIS. That is what I recommended to the Judiciary Committee yesterday or indicated my personal support of. I think that is a sensible way of dealing with it.

Mr. ECKHARDT. How did you feel about that?

Chairman WILLIAMS. That is fine.

Your comment would not limit it to the independent agencies, or would it?

Mr. ECKHARDT. It would be generally applicable. Let's hear from some of the others here.

Chairman CURTIS. Mr. Chairman, if I could take two parting shots, because I get nervous in this area.

I think that the subsection b(ii) fix that the administration has proposed is essential. That must be addressed prior to July 1.

I am very concerned that if the Congress requires a deliberative process that takes us up close to the July 1 effective date, so as to endanger the b(ii) fix, by thoughtful consideration of proposals for amending (c) or though consideration of alternatives to the suggested b(ii) fix, I think we have got a very dangerous situation on our hands.

We have gone to considerable effort to try to retain people on the promise that the implementing regulations will take care of a good many of their problems. They have, but they were only available as of yesterday. But we have also retained people on the promise that the Congress would address the counseling and assistance provision and conform it more exactly to what appears to be their intent.

I would hope that, if the deliberative process cannot be concluded in a month's time, the Congress will extend that July 1 effective date. Career decisions will be made and are being made now that will not wait for a stroke of midnight fix by July 1. So, I think the risk is considerable. Not only do we risk losing people, but our ability to bring people into government in this sea of uncertainty is paralyzed.

The second point I wanted to mention in this area is a rather philosophical one. Maybe it is just a problem with buzz words.

The "revolving door," to the extent that it means bringing people in and out of government for periods of limited service at high managerial positions is inherent in our process. It is the lifehood of our system. It is a very necessary and appropriate part of governmental operation. We need new ideas, the testing of past practices. If we lose that ability to bring people in at the upper echelons of government, I think we are doomed to create an inbred bureaucracy that will grow even more aloof from the poeple, which will have less understanding of the practical effects of its actions, and it will become indifferent to criticism.

I think that is what is at stake here. It is a very important thing to keep in mind.

High ethical standards for the servants of the people are important. But there is balance that must be struck here by the Congress, as in all other aspects of life. That seems to get lost in the vocabulary of convenient labels.

Mr. ECKHARDT. I think I can say on that that I agree with you, and I have been on the record as agreeing with you since this legislation commenced.

I agree entirely that the interchange between the actual securities area and governmental people that deal with securities is extremely important. It is not evil that that interrelationship occur, in my opinion.

I think both of you have already recognized the point that there are reasons why a person who has participated personally and substantially as a government employee in a particular governmental action should not after he leaves the government be involved in it permanently. Ultimately, of course, that particular action becomes settled and moot, and he can continue to practice in other areas.

I do not think we have any quarrel with that kind of limitation. Indeed, I think that that should also include counseling and advice with respect to the particular action. I think it should be permanent. As a matter of fact, in this area it seems to me the act is weaker than would be desirable because the act as presently written imposes a permanent ban on participating personally and substantially, but does not bar advice permanently in the action in which the person has been involved. That is taken up in section (b) with a two-year limitation. I cannot see any reason for limiting to two years the bar to consultation and advice in that kind of situation.

Chairman WILLIAMS. We agree with you completely. In any event, both the bar rules and our own rules would supplement it on a noncriminal basis.

Apparently, the logic for the cut is one that stems much more from dealing with scientists and educators.

Mr. ECKHARDT. There is one other thing that seems to be too loose in the act. That is that the only bar with respect to participating in rulemaking is in section (c). From the time of the publication of a particular rule in the Federal Register until the conclusion of that rule, one should not be engaged in that after leaving the agency if he has been engaged in that particular rulemaking after the time of the publication of the rule.

I can see no reason why rulemaking is less sensitive to such influence. Indeed, I think it is more so.

Chairman CURTIS. It depends on the rulemaking. If the rulemaking has identifiable parties, it would be precluded. For example, exemptions are often given by specific rule.

Some procedures have this mixture of formalism and informal participation where there are identifiable parties who acquire rights of participation in the course of proceedings, such as the right to cross-examine. That may still be brought within this prohibition even though it does not say specifically that it is.

Mr. ECKHARDT. I am suggesting a little different approach. I am not saying that, because you participate in the rulemaking, you would thereafter forever be barred from representing a person affected by the rules, but only that the rulemaking would be considered as a specific event or action from the time of the commencement of the publication of the proposed rule until its adoption. With respect to the specific participation in the rulemaking procedure, having participated while with the agency would bar one from participating in the rulemaking process if, in the meantime, he left the agency.

I am asking for a rather mechanical means of dealing with this rulemaking that I think would give absolute notice to those affected.

Chairman WILLIAMS. Would that be where they were personally and substantially involved? Or would it also include official areas?

Mr. ECKHARDT. Well, it is my view that we ought to limit the whole thing to one who has participated personally and substantially as an officer. It seems to me that the other provisions of (b), which operate when one has certain matters under his jurisdiction should be subsumed in "participated personally and substantially" in every case in which it would apply. Where such personal participation cannot be established, the mere general jurisdiction over the subject matter should not preclude activity after leaving the agency.

It seems easier to determine practically whether one has participated personally and substantially than it is to determine whether one has within his jurisdiction or scope of authority some effect on the particular action, particularly when you are dealing with a criminal statute.

Chairman King?

Chairman KING. As you probably know, the Consumer Product Safety Act contains a post-employment restriction which is in many respects much broader and in many respects much more restrictive than the ethics legislation under consideration now. In effect, it prohibits employment by or compensation from any manufacturer who is subject to the jurisdiction of CPSC. We are operating in a somewhat different situation at this point and in large measure would not be affected by the bill as it now stands.

We have supported the administration's amendments to the degree that they clarify the confusion that exists to the application of the two sections. We generally support, if possible, resolution of the issue so that an extension is not necessary.

Mr. LENT. Would the special provision you have with respect to your agency affect someone representing as an attorney?

Chairman KING. We have read it to cover that, yes.

Mr. LENT. It applies so that they may not accept compensation from any manufacturer subject to this act?

Chairman KING. We have applied it rather literally to cover situations involving both attorneys and trade association representatives of a manufacturer. We have been able to resolve the problems that have arisen on this by some rather careful consideration on a case-by-case basis. But we think it is overbroad and does not focus on the problem.

Chairman WILLIAMS. How does it read?

Chairman KING. Section 4(g)(2) of the Consumer Product Safety Act says: No regular officer or employee of the commission who was at any time during the twelve months preceding the termination of his employment with the commission compensated at a rate in excess of the annual rate of basic pay in effect for grade GS–14 shall accept employment or compensation from any manufacturer subject to the act.

And it is limited to one year.

Commissioner PITOFSKY. Mr. Chairman, I agree with most of what was said here this morning but perhaps not all.

I think we all agree, and indeed the canons of ethics applying to lawyers make clear, that, if you had actual and substantial participation in a matter, then you are permanently barred.

I agree completely with Chairman Curtis on his comments on b(ii). I think the statute is complex and vague and it is criminally enforced. I think the proposed amendments, which would limit the counseling provision to situations in which there has been actual participation and where there is a subsequent, on-site appearance, is probably a good idea mainly because of the nonlegal—that is the scientific—community. I would like to at least raise some questions concerning the one-year ban.

I might note that the Federal Trade Commission now has a proposed rule which is out for public comment which would require a one-year absolute ban and then would set up a system in which people who have been at the commission at a GS–17 level and above, plus commissioners, must seek clearance on all matters that were pending at the commission while they were employed. That clearance would be granted in limited circumstances, where no nonpublic documents or information came to the attention or were likely to come to the attention of the party and unless no present advantage could be conferred.

Let us turn, however, to this question about the one-year ban or at least the one-year ban for people below the commission level. I might point out I was a bureau director. I left to practice law and to teach. I am troubled by the notion of a commissioner or a bureau director coming back to his or her own agency within a year. The former bureau director will know how decisions are made, who makes them, what the history is, and so forth.

I should add that it is easier for people in some agencies than others. I appreciate that, in some of the agencies, especially when SEC or tax work is involved, it is very difficult to practice law without dealing with the Government. But, still these people who leave can counsel, can stay back in their law offices for one year, and then appear at their old agency.

Mr. Eckhardt. Would you permit a bureau director, for instance, to give advice if he did not appear as counsel?

Commissioner Pitofsky. Yes. In other words, if it was just something that was at the agency but the bureau director had nothing to do with it.

Mr. Eckhardt. In other words, you would simply add some kind of provision concerning the person in a level of, say, bureau director to the present provisions of it?

Commissioner Pitofsky. That is right.

Mr. Eckhardt. Would you suggest (c) go as far? Of course presently it would include down to GS–17. It would also be permissible to enlarge if even below that if a comparable authority were found to exist by the agency, as I understand.

How about that question of delegating authority to enlarge it with respect to this kind of limitation? A person now employed below 17 does not really know whether ultimately he is threatened by the act or not. This is left to a delegated authority which Congress has not elected to decide in the statute itself.

Do you think that is desirable?

Commissioner Pitofsky. I find that troublesome. We are dealing with the criminal statute area. There are some virtues in having sharp arbitrary lines.

Chairman CURTIS. If I might ask, does the total one-year ban preclude any communication, oral or written, even though it is with respect to an entirely new matter, and even though it is with respect to a matter outside a person's official responsibility?

Commissioner PITOFSKY. That is right.

Chairman CURTIS. I think for some agencies that is going to work and that is perfectly appropriate, as you point out. The Federal Trade Commission lodges final decision making authority in some of its high staff officers. Other agencies do not. Indeed, other agencies have such broad jurisdictional involvement that it seems to me that there may be matters which were not within a person's official responsibility where they are total strangers to other parts of the department.

One of the things that worries me about the regulations is that subsection (c) says thou shalt not make any written communication. The regulations say, yes you can in certain circumstances.

I think that is a sensible way for the regulations to treat the question: signing 10–Ks, proxy solicitation materials, and anything of that nature where you, in a sense, are performing a certification function.

But, again, we are dealing with a criminal statute.

Inherent in any communication is the intent to influence someone. That is the thing that bothers me about this.

I take it that Mr. Eckhardt is searching for a way of giving some administrative shape to the peculiarities of the problems and the circumstances that attend different agencies.

I think it is perfectly sensible, but I worry whether we have the time to do it.

Mr. ECKHARDT. I think that basic to this whole discussion is granting some time—I have not heard much objection to an extension of six months. An extension alone is not enough. I think, if your people have this hanging over their heads without some idea about what we are thinking about as to ultimate resolution, the six months may be only a little additional time to find moving companies and other jobs.

I would like to see us address it fairly broadly. I would like to ask for your input, Mr. O'Neal.

Chairman O'NEAL. Thank you.

I think we have the same kinds of general concerns that have been expressed earlier. I would agree generally with what Chairman Williams and Chairman Curtis said. I think that certainly an amendment to (b) is essential, of the kind that the administration has proposed.

I like the Williams amendment to subsection (c). I think that would be useful.

I would have no problem particularly limiting the application of that so that commissioners might be covered under existing law. I have a problem going below that. In the past several months we have been undergoing some pretty fundamental changes in the agency.

There are certainly questions in a lot of the minds of ICC employees about their futures. On top of that, we are laying a statute that is another element. So, I am concerned that some people may decide to leave before July 1, when, without the statute, they would stay a substantial period of time.

It is awfully important to keep in mind that this is a criminal statute that we are talking about. It is a confusing statute in many ways. I firmly believe that, if you are going to have criminal sanctions, we ought to have them as clearcut as possible.

Mr. ECKHARDT. Are you primarily concerned about the section (c) provisions?

Chairman O'NEAL. I would say that we are primarily concerned with (b)(ii). We have concern with (c) because the criminal statute goes to the contact.

You talked earlier about what we are trying to get at here. If it is the intent of the Congress to eliminate interchange between the private world and the government, I have a feeling this existing statute will achieve that purpose. The question is, is that a good idea? I have real doubts as to whether that is a good idea in our society.

Mr. ECKHARDT. Do you have doubts about it? Or are you convinced that it is not a good idea?

Chairman O'NEAL. I do not think it is a good idea.

Mr. ECKHARDT. I agree with you.

Chairman O'NEAL. If we are concerned about undue influence or the appearance of undue influence, it seems to me one very good way of monitoring that is to have public disclosure. Let everybody know who is making the contacts and lay it right out there in the record.

In a sense, we have been talking a lot about deregulation at the Interstate Commerce Commission. Maybe this is a little deregulation in the sense of ethics and leaving the issue more in the marketplace.

Mr. ECKHARDT. Do you object to (c) if it were limited to chapter 53, subchapter 2?

Chairman O'NEAL. I am still concerned about the impact on bureau directors, and heads of offices, particularly if it extends to anything within the jurisdiction of the agency.

Mr. ECKHARDT. Who in your agency would be covered by chapter 53, subsection 2? That is that section d(1) category.

Chairman O'NEAL. Then you are just limiting it to commissioners? All right.

Commissioner KENNEDY. Perhaps I can represent the hybrid perspective that Chairman Williams referred to. On the one hand, we are a regulatory agency. On the other hand, we are sort of a little island of police in that vast sea of entitlements and friendly programs that is the HEW.

I see this primarily from the perspective of somebody trying to recruit and hold scientists and technological people.

Our department sees three very troublesome problems.

The first of these is b(ii). The Rodino amendment, the administration proposal, in our view, deals with that problem entirely successfully by narrowing the provision to apply only to actual presence in a matter and by narrowing the jurisdiction umbrella to personal and substantial involvement. That is fine.

There was a second problem, I think, that is a little unique to research workers who support their activity in nonprofit institutions by essentially persuading people that they have a great idea and should be financed to pursue it.

Those folks might have found themselves going back and being professors or deans or provosts or researchers and then not being able to return and sign or authorize a research grant to support the work that they want to do. We regard that problem as adequately solved by the proposed OGE regulation in which a very specific exemption is carved out for that particular kind of activity.

So, as far as the particular needs of scientists and reserachers of other kinds who move between the nonprofit private sector and the Government, we believe that those special problems, due to the mis-aiming of some of these provisions, are solved, either by the administration approach to the legislation or by regulation. That is, most of them are solved.

I responded to the questions in your letter by thinking very hard about whether, in two years of having all kinds of folks appear or say things to try to do things with, to, and for my agency, I detected among any of our alumni any kind of impropriety. I had to conclude that I did not think that there was a problem.

Then I asked myself whether I thought that, even after the kinds of corrections that will solve the narrow difficulties that we see in this legislation, that its social benefits are going to exceed its social costs. I think the costs are going to exceed the benefits and by a very substantial amount.

I think to understand this point I have to remind you that we scientists are simple folk. We are not much concerned with the kind of history, audit trail, that there is in the government for dealing with this kind of problem, for jockeying with it.

They regard it as a bore whether we can or cannot adequately narrow an aids-or-assist provision. They aren't even going to read it. They are going to carry away a general impression of whether the Congress trusts or mistrusts people in agencies. They are going to carry away an impression of whether the Government knows what it is doing or not.

I submit to you this activity we are all engaged in is about as good evidence as you could find that this Government has had a little difficulty figuring out what it wants to do. I simply think that the cost of the whole program has not really been adequately reckoned. I thought something ought to be said about it.

Mr. Eckhardt. The problem I have with the Rodino provision is that it cuts too far. It would also cut into the SEC area and the Federal Trade Commission with respect to assistance in representing. If that is only to be personal presence, it may work out very fine for scientists—excluding them. But it seems to me it excludes a very sensitive area that ought to be controlled.

I do not want some lawyer from SEC sitting in the back office doing the things that he could not do in front. I would rather have him in front than in the back office.

Maybe we ought to be dealing with what constitutes "represents" or "aids, counsels, advises, consults, or assists in representing any other person."

I am inclined to think that what we ought to do is just say "represents or assists in representing any person" and then define that. I think we run into trouble with "aids, counsels, advises, and consults." It is going beyond having any relationship to any kind of formal or informal procedure. It seems to me that this is what reaches out and gets the scientists.

I, frankly, would think that there should be no limitation whatsoever on a person who goes from a governmental position, say, to a university or to a nonprofit organization, engaging in whatever aid or assistance he may do. He is not going to be trying to sway people in a special interest direction.

What I am concerned about is somebody who goes as counsel or as a scientific advisor in connection with some kind of representation that results in an advantage or disadvantage to those appearing before an agency—to sway that decision. It looks to me like the English language is susceptible to putting that into a form that would not prevent the scientist from engaging in or contributing his knowledge in areas of the type we are describing.

But I am troubled about striking out anything but personal representation. It seems to me that what we ought to define is what "representing" means.

Chairman CURTIS. Mr. Eckhardt, I think the problem is really trying to distinguish between matters within one's official responsibility and matters with respect to which one is personally and substantially involved.

Mr. ECKHARDT. I would agree that we ought to leave out everything but "personally and substantially involved."

Chairman CURTIS. I would be interested in Don's comment on this. One of the things that I took to be the objective of the act is that the Government is a very substantial participant in R&D activities. A lot of money is at stake. If you just exempt out the scientists, et cetera, then I think we miss that problem.

Commissioner KENNEDY. I do not think you can have an occupational exemption. Indeed, the chairman may be right about a limitation by "presence" going too far. But it is difficult to know otherwise how to solve the problem sufficiently economically so that it can get understood and passed in time to rescue what appears to be a very serious impending problem.

Part of the problem here is not just that people may leave in June. It is that the longer we persuade people that they ought to start investigating, then the more they investigate, then the more other reasons start to appear. I just do not think it is a healthy situation for the Government to have large numbers of its most qualified people anxiously looking around for what they would do "if."

Chairman WILLIAMS. You are so right. That is our experience.

Mr. ECKHARDT. Suppose you have a person who has gained a lot of experience in a certain scientific area who has left the government. And you have a situation involving the very work that he had been working on. That is, for instance, certain types of testing with respect to whether or not an insecticide is dangerous and so forth. And he is not personally involved in advising in connection with the rule, but he gets on the phone or goes out to dinner with us, or he otherwise communicates with persons who have been very much under his aegis, persons who have worked with him on the same topic. And he is em-employed by a company that has a real interest in manufacturing insecticides.

Do you limit it just to his personal involvement in a formal or informal appearance? Is not he really having a more insidious and perhaps a more undesirable effect on a decision based upon his personal knowledge with Government by his advice and counsel and and more or less surreptitious influence than even if he came out publicly and, of course, persons who disagreed with him could also bring forth their disagreement?

It seems to me that, if you just limit this to personal presence in any formal or informal appearance, that leaves a gigantic loophole in an area that is really the most dangerous area of improper influence.

Chairman CURTIS. I think that one of the difficulties is legislating ethical conduct. We are dealing with a criminal statute here.

I still believe that the great majority of people will observe ethical standards beyond what is written here. The advantage of the "personal presence" language that I see is that it is a bright line. It is one that is capable of administration. You know whether you personally appear or not.

Mr. ECKHARDT. Are you addressing the use of this with respect to action which is within the jurisdiction of a person? Or are you addressing the question of including influence, other than personal involvement, in a formal or informal appearance when the bar is only on one who participated personally and substantially as an officer or an employee?

If you are addressing the latter, you have opened the gate, for instance, to what I thought we had formerly condemned. That is, for instance, a person who has worked on the same case or working in the back of a law office and really writing all the briefs but under the name of another.

It is not the question of influence there so much as a question of switching sides. That can exist with respect to a scientist as well as a lawyer.

I am suggesting cutting out everything but the limitation on one who participated personally and substantially as an officer or employee. In other words, eliminate that provision that just merely says because he was engaged in the particular agency and had general authority over some segment of operations, that he is therefore barred. I would eliminate that altogether. It seems to me then, that whether he is personally appearing, or appearing as an advisor or consultant, it may be included as something that can be prohibited generally.

Chairman CURTIS. I read a further objective in this statute. Maybe, if you take them in reverse order, (c) says no communication for one year. And then (b) says, and for an additional year, if it was a matter within your official responsibility, you can make no appearance. And, as the administration would change (b), they would say, and for an additional year you may not sit at the counsel table, even though you were not the appearing party yourself——

Mr. ECKHARDT. The thing that troubles me about that is I do not see what is magic about the passage of one year.

Chairman CURTIS. I do not want to appear to quarrel with that. I think, if you are personally and substantially involved, you should be permanently barred from advice and counsel as well as direct appearance.

Mr. ECKHARDT. But, if we follow the Rodino provision, that would not be covered, would it, in the second year?

Chairman CURTIS. It is perhaps an interpretation that exists by the negative pregnant saying, if the statute only precludes you for two years from personally appearing, then implicitly you are not precluded from other conduct such as counseling and giving advice, even with respect to a matter within your personal and substantial involvement.

But with respect to lawyers the canons of ethics will pick that up.

Mr. ECKHARDT. What about accountants? Would they be covered by canons of ethics?

Chairman CURTIS. I am not familiar with that.

Chairman WILLIAMS. I do not know.

Under Section 207(b)(ii) in the area of official responsibility where one can aid and assist, as the stature would be amended, our conduct rules—not the ethics of the bar—proscribe such conduct.

Commissioner PITOFSKY. I would hope that—(if the legislative history does not already indicate it, it should)—any rule that is adopted here would not undermine either the canons of ethics or any rule that an agency has that may go beyond the general statute.

I wanted to address some of the points that you have made. I am sympathetic with the simplified approach that you have suggested here, which would draw a very hard line and distinguish between actual participation on the one hand, as opposed to matters which come within their official purview. But it is sometimes very difficult to know or recall or recognize a situation where somebody in a fairly high bureaucratic position had actual participation. In any event, those problems are present in this kind of legislation no matter what.

You also mentioned that there is nothing magic about one year. I certainly agree with that about counseling. There is, however, a point about one year with respect to the absolute ban. Turnover at regulatory agencies is frequently fast enough that, if you do let a year go by and come back, many of the people that you dealt with before will not be there or will be in different positions.

Of course, there are going to be situations in which someone is picked up by the provision and really did not know anybody in the other part of the agency—but I think that is rare.

As for the remaining portion of the statute, I agree with the general consensus here that it is very complicated, very unclear, and puts people in tremendous peril.

Mr. EVANS. Mr. Pitofsky, you are talking in terms of people coming back in and talking physically to the people they used to deal with. Does your concern apply as well to the submission of formal briefs or presentation of oral arguments and so forth in court or before the agencies who have the same concern? Or are you talking about special access?

Commissioner PITOFSKY. It is a lesser concern. But I think there is still a problem in people doing business with the agency soon after they leave.

To answer your question, it extends beyond actually coming in and having a meeting in your old office the week after you left with people who just ceased to be your own assistants. That, of course, is one of the most serious problems here, and that is what the absolute ban is designed to deal with.

I have a last point. I am very concerned about my own limited knowledge of other agencies and the problems created in other agencies. It was suggested much earlier that you can deal with this with special rules that are tailored to the facts of the careers of different people.

Mr. ECKHARDT. It seems that there ought to be some basic standard of ethics that would be enacted in this statute leaving to the agencies questions like the one you have raised. The one-year ban, if it were applied only to the top people, and then permitted to be extended by the agencies under their own rules, would seem to me to be an example of what I am talking about.

I am very, very concerned about this appearance other than personal. I am not altogether sure that the canons of ethics in fact protect that situation. I have been in situations as a lawyer in which I think lawyers commonly do not pay attention to the canons of ethics when it is not a formal hearing or when their appearance is not a formal one.

Surreptitious contacts are where the danger really lies. I would hesitate to put in a personal appearance as the only limitation.

Chairman WILLIAMS. Then you have Don's problem.

Mr. ECKHARDT. Well, I think we go a long way toward solving that when we talk about "personally involved" and get rid of that rather broad sort of jurisdictional guilt situation.

Chairman WILLIAMS. Mr. Chairman, there is an example in the regulations that is under subsection (c), as I recall, specifically tailored for HEW which I would like to address. It is an NIH grant example in which a former senior employee of NIH then prepares an application and is listed as principal investigator on the grant. He does not appear before the agency. He does not advocate.

That is characterized here as nonrepresentational activity, therefore not barred by Section 207(c). That is designed, I think, to deal with the dilemma that is presented by a scientist in a senior governmental position working in a given area who then wants to go back to his university or his nonprofit research organization and still continue to be engaged in that area where almost all the research is funded by the Federal Government.

Commissioner KENNEDY. The fear is that, even narrowing to personal and substantial involvement, if that involvement is with the whole broad area of research, as an NIH Institute director has, it would immunize him and that area from him were he to act as a department chairman or a dean of a medical school in which program grants and other aid were applied for from that program, where in fact that program has a de facto Federal monopoly on the funding available for that kind of work.

That is the difficulty.

Mr. ECKHARDT. I think that leads us to want to define what a formal or informal appearance is.

Commissioner KENNEDY. And you would like to do that short of limiting it to presence, because it is your feeling that that simply drives the contact into more difficult-to-follow and more surreptitious channels.

I guess this just illustrates that we are trying to cover such a broad range of activities in character that single solutions just always are going to be left hanging out over the edge.

Chairman WILLIAMS. It might well be difficult to design a concept that would take care of the NIH problem.

You have to wonder about an SEC attorney appearing on a pleading or identified in a petition filed with the Commission. How do you distinguish one case without distinguishing the other one?

Commissioner PITOFSKY. The lawyer-non-lawyer line is not going to do it either because it seems to me there are economists now who are in policymaking positions. There are other social scientists in policymaking positions. And anything designed to take care of the problem you mentioned is going to open them up to all sorts of

opportunity to promptly change sides on matters that they are involved with.

There is a great problem in legislating across the board.

Ms. CHRISTIAN. In some agencies such as the Interstate Commerce Commission our canons permit non-lawyers to appear before the commission performing the same types of functions that lawyers perform.

Chairman WILLIAMS. So, the canons would not help you there at all.

Ms. CHRISTIAN. That is right.

Mr. ECKHARDT. We have identified a lot of problems that certainly justify a six-month delay in putting these matters into effect. Certainly you have identified a lot of dangers to your own agencies in losing personnel. That would seem to me strongly to militate in favor of some time to look at the question.

I think this very discussion shows how, though the agencies have some areas in common, they have a multitude of separate and different problems.

I have always thought that these agencies are so different in their procedures that you have to tailor make the legislation controlling things like rules. To a certain extent this is true of ethics.

I think we have to take a little time to look at the different problems of the agencies. But I do feel there are some sort of common denominators.

Perhaps the best thing to do, at least from the standpoint of a member of Congress, is to provide some time in order to obtain information of the type I am talking about without retreating from the proposition of insisting on statutory protection and integrity of the agencies.

I think many of the philosophic arguments that may arise in discussion like this can be solved when you actually get down to trying to put something in language. I would like to work a little on that with our staff and discuss it with your staffs, presenting some positive language.

We already have several approaches: the Rodino amendment approach, the administration's several proposals for amendment, which I do not think meet all the problems we have described here but which at least would be a starting point in this matter.

Chairman CURTIS. Mr. Chairman, I think we all have an appreciation for the complexity of the arrangements and situations which this type of broad standard confronts and has difficulty in dealing with. I am a little worried, if we try to reevaluate the entirety of the fabric of 207 and extend the act for some limited period of time for that endeavor, that the continued uncertainty (now that everyone has become so alert and sensitized to this question) alone may precipitate out of governmental service some of the people that we most need to hold on to.

I would hope that, however unsatisfactory it may be as a solution to the problem from your prespective, that the recommended fix that is captured in Chairman Rodino's bill could be put in place while this further consideration takes place.

Mr. ECKHARDT. I cannot quite understand what you mean about the recommended fix.

Chairman CURTIS. The Administration's proposed fix to (b)(ii), I think, should be done while a further deliberative consideration by the Congress proceeds. If you leave the statute the way it is while that further consideration proceeds—even though you may extend the effective date—I am just afraid the continued uncertainty alone will cause people to make those career decisions that we have asked them to defer on the promise that this thing would be fixed promptly.

Chairman WILLIAMS. I have got a little different slice at that but probably towards the same end. While the uncertainty goes on, employees are more receptive to listening to overtures that come their way. When somebody knocks on their door, with the uncertainty of the ethics bill, they listen. If they find it attractive and they do not want that opportunity to go away because of the overhang of the bill, they reach for the brass ring.

There is a lot of anxiety about it. I do not know how many more employees we will lose if there were a clear message that it is being re-examined.

I do not know how much sympathy there is either in the administration or in Congress—you can judge that better than I, Mr. Chairman—for a delay.

I think there is a degree of concern that a delay might tend to open the whole subject up in ways that at least some people would consider nonconstructive. I have not addressed that question at all in my comments here today.

I guess it becomes a judgment call as to whether precise addendum or attachment or whatever to the now pending bill is more or less likely to be productive than trying to move the Ethics Act itself back to the drawing board.

Mr. ECKHARDT. It seems to me that we have got a lot of problems that are not solved by anything that is now laid out. Of course, we do not have to solve them all at once.

Chairman WILLIAMS. I think if this bill is enacted into law, we might as well forget it. I do not think there is going to be any great sympathy for the agencies' plight sufficient to reopen the matter on the part of the administration or the Congress—at least not in the near term.

Mr. ECKHARDT. That is what I fear. If we simply say we are going to both delay the time and then we are going to amend in certain specific ways, we will delay for six months, but we will ultimately come out with what we have agreed to now. It is just a function of the inertia of Congress in the area in which the momentum has been taken out.

I hate to see us move to something that is an incomplete solution without considering some of the matters that have been raised here today.

Chairman CURTIS. My concern is that, if the Congress were to delay, they of course would have to vote it. If you do not get it delayed, we are coming up very close on the July 1 date. I think it is a strategic consideration.

The best of all worlds would be to delay it and give some thoughtful consideration to some of these questions. But, if the pursuit of that objective loses the opportunity—because the Congress will not vote for it—to fix b(ii), then we have real trouble on our hands, in my opinion.

Mr. ECKHARDT. There was considerable response to my testimony when I urged caution the first time. Indeed, they put on an amendment in the House that would have very largely taken the risk out of it by setting up standards and then permitting the agencies to define their own processes. So, I do not think Congress is all that reluctant to deal with this question now.

The trouble is that the Congress has acted, I think precipitously, because the matter was an emotional one. It had all the impetus of the administration behind it. It had the buzz word of "revolving door."

Chairman WILLIAMS. I might just note for your information that Acting Chairman Seevers of the CFTC has indicated his support for a concept, such as our proposal on subsection (c), as has the entire NLRB and their independent general counsel as well.

There is broader support than just those around this table.

Mr. ECKHARDT. We will adjourn at this time. Thank you for your presence.

[Whereupon, at 12:05 p.m., the committee was recessed.]

Appendix F1

Federal Communications Commission,
Washington, D.C., April 4, 1979.

Hon. Bob Eckhardt,
Chairman, Subcommittee on Oversight and Investigations,
U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: I appreciate this opportunity to provide you with my views on the impact of the Ethics in Government Act of 1978 upon the Federal Communications Commission and on proposals to defer the effective date of, or to amend, parts of the new ethics legislation.

It is, of course, too early to assess definitively the full consequences of the new legislation. I cannot report to you, as many agencies have, figures representing likely or imminent departures of great numbers of high level commission officials. Although the Ethics Act directly affects only the Commissioners, the major Bureau and Office Chiefs and their deputies, and others with significant policy making responsibility, my discussions with my colleagues indicate that it has had a more pervasive impact on attitudes toward government service throughout the ranks. I think that many younger agency professionals on the way up the ladder have been asking themselves hard questions about their career commitments. These questions might have been deferred, but there is now some concern that a commitment to government service may be permanent or at least difficult to reverse, and that fundamental career choices should be addressed before the effective date of the new law.

I think, moreover, that there is a subtler concern about the new legislation, ironically enough, not on the part of those who have planned to leave but of those who have been long committed to stay. For many talented and dedicated lawyers and other professionals at the FCC, government service has been a voluntary act of personal commitment. Opportunities in the private sector at higher salaries could have been, and may often have been, available. But for these individuals, the importance of the issues and of public service has been its own reward. Having spent my entire career in the public sector, I think I can fairly reflect this sense of commitment to you. But the new, much more stringent inhibitions on any flow between the private and public sector could impair that commitment: it becomes less a voluntary one than one externally imposed.

The basic question to be addressed, therefore, is not whether new ethics legislation was necessary or appropriate; that judgment was properly made by the Congress last October. The main concern is, of course, whether the new legislation may be overboard and likely to have an unintended adverse impact upon the government's ability to attract and retain the best people available.

The Congress and the public were properly concerned with maintaining both in fact and in appearance the integrity of the government process. There have been some egregious cases of officials revolving from positions of public trust for private gain. The public has demanded more stringent standards, and such standards were essential to restore confidence in government and public officials. The measures reflected in the Ethics Act have also, I think, generally worked to the advantage of career government officials by restoring prestige and public confidence in government service as an honored profession.

There are, however, serious risks to tightening too much the restrictions on employment after government service. Overly severe restrictions may substantially work against the public's other expectations of government. For I believe that the public expects not only a government of basic integrity but a government of competence and high professionalism. This is not merely a matter of principle, but of dollars and cents. And, the public is increasingly demanding that the government be efficient and well run as well as creative and imaginative in utilizing limited resources and dealing with vexing issues of public concern. It is axiomatic that no agency of government is any better than the people who staff it at all levels; and, thus, the prospect that government will not be able to recruit and retain the best available talent is a public policy concern of the most essential nature. It is no mere matter of the prospective financial well being of high level federal officials.

That is why, I believe, this Committee is very wise in carefully assessing now the impact of portions of the new legislation which have resulted in uncertainty and concern throughout the government. On behalf of the FCC, I support this review, knowing that my concerns are widely held. The new Office of Personnel Management has, I understand, adopted implementing regulations that could alleviate some uncertainty and concern. The regulations, in particular, take careful account of the letter and memorandum dated February 16, 1979 from Senators Ribicoff and Percy of the Committee on Government Affairs and Representatives Danielson and Moorhead of the Committee on the Judiciary to the Office of Government Ethics. There is doubt at this point whether regulation will be adequate or whether technical amendments will be required to conform the 1978 Act. It does seem obvious, however, that some serious questions have been raised about the intended effect and the actual consequences of the 1978 Act.

As to these serious questions, both the statute and the legislative history affirm that Section 207 is rooted in two basic principles. The first is that no former official should participate after government service on behalf of a private party in the same matter in which he or she actively participated while in government. This is the long-condemned practice of "switching sides." The second is that a former employee should not derive private enrichment as a result of *inside* information acquired as a consequence of government service. I am concerned, however, that at least two aspects of the revised Section 207 may be unnecessarily broad and not directly keyed to those two basic principles squarely embodied in Section 207.

The first aspect is the one-year, absolute ban against any representational appearance by a former official at or above the GS–17 level (or policy-makers so designated by the Office of Government Ethics) as contained in revised § 207(c). A flat ban against any representational appearance at one's former agency, irrespective of a lack of previous participation in the proceeding at issue, does not have a direct logical relevance to either "switching sides" or to the possible improper use of inside information. If a former employee has had no involvement whatsoever in the particular matter before the former agency, it is far from clear what policy is advanced by prohibiting participation. I believe that the one-year ban also unrealistically presumes that a professional in one specialized field can readily secure a comparable position in the private sector in a completely unrelated field when government service is completed. Consequently, many present or potential government employees see the categorical one-year ban as seriously impeding them from freely leaving the government. This is especially regrettable to me because, as I stated earlier, I oppose any structure which would make public service appear to be something less than a matter of choice. Accordingly, I share the views on the one-year ban expressed by the Chairman of the SEC before the House Subcommittee on Administrative Law and Government Relations on April 2, 1979, and hope that your review of the statute addresses this aspect of the legislation.

The other aspect of the new ethics legislation raising serious concern is the proscription that appears to disallow representation and/or consultation (depending on grade and position) for two years by a former official in any matter "which was actually pending under the [the employee's] official responsibility within a period of one year prior to the termination of that responsibility." 18 U.S.C. § 207(b)(3) (effective July 1, 1979). I say "appears to disallow" because of the February 16, 1979 momorandum of law submitted by Senators Ribicoff and Percy to the Director of Personnel Management referred to above which construes paragraph (b)(3) as extending the two year ban only to matters in which the employee participated "personally and substantially." However, our attorneys point out that the revised Section 207(b)(3) is written in the disjunctive and appears to exclude participation where the employee participated either "personally and substantially" as an officer or employee *or* "which was actually pending under [the employee's] official responsibility." Moreover, the Office of Personnel Management has issued (on March 23, 1979) interpretative regulations which state:

§ 737.9. * * *

(e) *Degree of prior participation or responsibility required.* Section 207(b)(ii) applies to a particular matter in which the employee participated personally and substantially, *or* which was actually pending under his official responsibility.

Notwithstanding, the OPM regulations take cognizance of technical amendments pending in Congress such as H.R. 3325 introduced by Congressmen Rodino and Danielson. Therefore, OPM's regulations also contain a "provisional" paragraph (e) to become operative should Section 207(b) be amended. The "provisional" paragraph (e) reads:

"(e) *Personal and substantial participation required.* This section applies only in cases where the former Senior Employee had personal and substantial participation in the particular matter involved."

I favor formally amending the law as proposed in H.R. 3325, and to limit disqualification solely to those matters in which the former employee had "personal and substantial" participation. Disqualification based purely on organizational positioning goes beyond the presence or absence of actual conflict; and, it could impact severely upon the post-government carrer activities of former top officials, denying both the public and the government the benefit of the judgment and expertise of these persons for an arbitrary reason. I therefore believe that the technical amendment of Section 207(b) is warranted and feel secure that the minor modification proposed will amply guard against actual or perceived conflicts in this context.

In conclusion, I freely acknowledge the difficult task of fashioning conflict regulations which perfectly balance the need for public trust in government and the government's need to attract people with keen minds, broad experience and diverse backgrounds. I believe that both the government and the public can gain from a structured flow of good people from the public to the private sector, and *vice versa*. Consequently, it is essential to establish an equilibrium in our ethics laws which assures both integrity in government and competence in government, the two fundamental elements of public trust and confidence. In view of the importance of this matter, the entire Commission and I support a careful reappraisal of the ethics legislation at this crucial stage in order to assure the proper balance of these compelling policy concerns.

By direction of the Commission,

CHARLES D. FERRIS,
Chairman.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 4, 1979.

Hon. ROBERT C. ECKHARDT,
Chairman, Subcommittee on Oversight and Investigations,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN ECKHARDT: I have been watching with interest your review of the "revolving door" section of the Ethics in Government Act of 1978, and I would like to share some of my thoughts with you about this issue and about the public reporting requirement.

In my twenty-seven years here at the Federal Communications Commission, I have seen many commissioners and high level staff employees come and go. Many have returned to appear before the Commission as public interest representatives and as advocates for commercial interests. Some have worked in special projects under contract with the Commission. On the whole, I think the Commission has benefitted from the insights into policy and procedure these people have offered in their private capacities. I also think the public has benefitted from the understanding of the public interest these people have taken into the private sector. While I agree that people should not leave the Commission and then work on matters in which they were substantially involved as government personnel, I would hate to see these people absolutely barred from participating in Commission proceedings for any period of time.

Since you are considering a possible revision to the Ethics in Government Act, I would like to take this opportunity to suggest a review of the requirement for publicly reporting the financial affairs of government officials and certain agency employees. This provision troubles me because I believe that it too may discourage qualified potential employees from considering government service.

People are sensitive about publicly disclosing private information about themselves and their families. Women who work outside the home and have assets of their own resent having to disclose these because of their husband's government service. Men whose wives have successful government careers feel the same way. Public reporting of private information may cause substantial problems within the home.

In addition, many government personnel are legitimately concerned about the safety and well-being of their families. The public reporting requirement will give potential kidnappers and unwanted solicitors access to detailed financial information about a large number of people who are not convinced that civil and criminal penalties for misuse of this information will adequately protect them and their families.

I believe that the risk to government personnel and their families is unnecessary in many cases. For example, the financial interests of members and employees of the Federal Communications Commission are restricted by statute to preclude conflicts of interest, and these restrictions have been interpreted to apply to members of the immediate household. Commission members and employees may not receive income from or own interests in entities subject to the Commission's jurisdiction. With this kind of restriction regarding conflicts of interest, public reporting of other financial information isn't necessary to protect the public. A Commission member or employee's outside financial interests must be unrelated to that person's official responsibilities.

To summarize, where appropriate, I would propose replacing the present public disclosure requirement with restrictions against conflicts of interest on the part of government officials. These restrictions could be enforced through the *confidential* filing of reports with a watchdog within the government. I am not bothered about reporting, only about the public disclosure of these reports.

Sincerely,

ROBERT E. LEE,
Commissioner.

Appendix F2

U.S. Environmental Protection Agency,
Office of the Administrator,
Washington, D.C., April 19, 1979.

Hon. Bob Eckhardt
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

Dear Mr. Chairman: We have your letter of March 28, 1979, inviting the Administrator to participate on April 3 in the round table discussions of the "revolving door" provisions of the "Ethics in Government Act of 1978".

As discussed with Ms. Kathy Seddon of your staff, neither Administrator Costle nor Deputy Administrator Blum were able to participate in these discussions due to conflicting prior commitments.

There has been a good deal of concern throughout the Agency as to the effects of certain provisions of the "Ethics in Government Act" upon our ability to hire and/or retain employees in upper level policy-making positions. As the law is relatively new and the regulations issued thereunder only recently published, we are not able at this time to specifically address the impact of the law upon our activities or provide documentation in this regard. However, we believe that the law, its regulations, and the Administration-sponsored amendments, introduced as H.R. 3325 and S. 869, will clarify the intent of the law and eliminate the cause of uncertainty among certain employees within the Executive Branch about possible barriers to practicing their professions upon leaving the Federal Service.

We appreciate the opportunity to respond to you on this important issue.

Sincerely yours,

Charles S. Warren,
Director, Office of Legislation.

[Enclosures retained in Subcommittee files.]

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